

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STEVEN KNURR, Individually	.	Civil Action No. 1:16cv1031
and On Behalf of All Others	.	
Similarly Situated; and	.	
CONSTRUCTION LABORERS PENSION	.	
TRUST OF GREATER ST. LOUIS,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	May 4, 2018
ORBITAL ATK, INC., et al.,	.	10:12 a.m.
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MICHAEL S. NACHMANOFF
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	KATHLEEN B. DOUGLAS, ESQ. Robbins Geller Rudman & Dowd LLP 120 East Palmetto Park Road Suite 500 Boca Raton, FL 33432 and JOHN C. HERMAN, ESQ. Robbins Geller Rudman & Dowd LLP 3424 Peachtree Road, N.E. Suite 1650 Atlanta, GA 30326 and CRAIG C. REILLY, ESQ. Law Office of Craig C. Reilly 111 Oronoco Street Alexandria, VA 22314
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(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

1 here. We're dealing with conversations to Northrop that are
2 alleged to have constituted a waiver of some kind, if not a
3 subject matter waiver, when they didn't, conversations with the
4 SEC that are alleged to have constituted a waiver, if not a
5 subject matter waiver, when they didn't.

6 And then beyond that, as, as I demonstrated, I think,
7 at the outset, there is this free-floating subject matter
8 waiver argument in which the plaintiffs use the right
9 buzzwords: sword/shield, at issue, but when you look closely,
10 Your Honor, it doesn't comport with Rule 502, as it should, and
11 it doesn't attach itself to any particular doctrine or line of
12 cases, and we readily admit, Your Honor, that where a party
13 puts the nature of an attorney-client relationship at issue as
14 in a legal malpractice case, you don't necessarily need a
15 disclosure by the client of privileged communications or work
16 product.

17 There is because of the nature of that claim, because
18 you cannot prove legal malpractice, courts say, without
19 necessarily bringing into the case privileged and work product
20 information, in that context, there is waiver notwithstanding
21 502's limitation, and in the context, Your Honor, of advice of
22 counsel, there again, we freely admit that in the advice of
23 counsel context, as soon as you say "advice of counsel" in an
24 affirmative defense, for example, you are deemed thereby to
25 have opened the door.

1 There's no advice of counsel defense. There's
2 nothing like it. There's no investigative advice defense that
3 we're raising. The affirmative defenses that the plaintiff
4 points to in, in our answer, A, don't mention the
5 word "investigation." I think it's wishful thinking on their
6 part that somehow those affirmative defenses involve the
7 investigation.

8 I can represent to you, Your Honor, that the
9 affirmative defenses at issue do not involve the investigation.
10 There's no --

11 THE COURT: Well, let me ask you a couple of
12 questions to clarify that.

13 MR. ANHANG: Please.

14 THE COURT: Does Orbital or do any of the defendants
15 intend to rely on the results of the investigation or the
16 investigation in any way at a trial of this matter?

17 MR. ANHANG: Only to the extent necessary to respond
18 to ways in which the plaintiffs inject the investigation into
19 this case, forcing us to decide how to respond and perhaps
20 responding in a way that necessarily refers to the
21 investigation.

22 But if the plaintiffs here today represent to you,
23 Your Honor -- and they seem to think that we're the ones who
24 dragged the investigation into this case, and understand that
25 what I'm about to say is something for which I would need

1 other respects, it's simply that the plaintiffs here are
2 mischaracterizing it, but in any event, in *Royal Ahold*, the
3 company there said that the investigation was being conducted
4 to satisfy the auditors and there was no such statement here,
5 and besides, *Royal Ahold* was looking at a, sort of a driving
6 force-type inquiry into the anticipation of litigation
7 analysis, which is not the controlling analysis, Your Honor.

8 I think I understood plaintiffs' counsel to accept
9 the proposition that this case is covered by the Federal Rules
10 of Evidence, including 502, but if you take a close look at it,
11 and again, take a close look at the language that I quoted from
12 the explanatory note, that what the subject matter waiver
13 limitation within that rule is intended to do, it's intended to
14 apply where the party at issue puts protected material into the
15 litigation in a way that's selective and misleading.

16 It's quite clear that the fact that there was a
17 disclosure here to the SEC pursuant to a confidentiality
18 agreement does not all of a sudden open the floodgates here
19 with respect to work product and doesn't even justify an in
20 camera review. An in camera review is not a consolation prize
21 that you're entitled to when you can't satisfy --

22 THE COURT: It's certainly not a consolation prize
23 for the Court.

24 MR. ANHANG: I couldn't agree more, Your Honor, but
25 when the courts are clear that it is the plaintiffs here who

1 In a substantial completion world, we did not
2 understand there to be a requirement that a log be produced for
3 everything by May 1, and I don't think the plaintiffs
4 understood that either, Your Honor.

5 THE COURT: Let's assume for a moment that I'm not
6 persuaded by your arguments and I believe that the plaintiffs
7 are entitled to some documents that they have not yet received.
8 I believe you've made an argument that whatever notes were
9 prepared during this internal investigation of witness
10 interviews were so intertwined with mental impressions and
11 attorney work product that they should not be turned over
12 perhaps even in a redacted form, or do I misunderstand what
13 you've said to me before?

14 MR. ANHANG: Well, I think that under a 502(a)
15 analysis, early evidence 502, as well as all the cases on work
16 product waiver and nonwaiver, including opinion work product
17 waiver and nonwaiver, I don't think the circumstances here
18 justify a finding that there's been a waiver of any form of
19 work product by the failure to produce a log by May 1, Your
20 Honor.

21 And this is an issue I would submit has not been
22 briefed, Your Honor, and we would welcome the opportunity -- if
23 Your Honor sees the issue here as coming down to the -- to
24 privilege log, and in their reply, instructively, Your Honor,
25 the plaintiffs --

1 recess. I will try and come to some conclusions and rule from
2 the bench shortly, but I hate to prolong this, we all have many
3 other things to do today, but I think we'll be better served if
4 I take a few minutes to collect my thoughts.

5 Court will be in recess.

6 (Recess from 11:26 a.m., until 11:40 a.m.)

7 THE COURT: This matter comes before the Court on
8 plaintiffs' motion to compel with regards to documents related
9 to the internal investigation. I have listened to the
10 arguments of counsel and reviewed the pleadings and tried my
11 best to understand the issues here. I find that the motion
12 should be granted.

13 Claims of privilege are disfavored. They shield
14 evidence from the truth-seeking process. The party asserting
15 privilege has the burden to show specifically why information
16 should be withheld.

17 The first question that the Court has examined is
18 whether or not the information sought was created in
19 anticipation of litigation. Litigation, of course, is always
20 possible, especially in these circumstances, but it's clear
21 that in this circumstance, Orbital had other independent
22 reasons reflected in their own documents for conducting this
23 investigation.

24 I find that the *Royal Ahold* case is on point in many
25 respects. I have looked carefully at the defendants' arguments

1 and cases and at their emphasis on Federal Rule of Evidence
2 502(a), and I do not find that it precludes turning over
3 information sought.

4 However, I find -- and plaintiff has conceded that
5 this case is really about -- this matter is really about a
6 limited request for witness interviews if such documents exist,
7 and this motion is being granted based on that narrowed
8 request.

9 I find that to the extent witness interview reports
10 were created during the course of the internal investigation in
11 any form, whether handwritten, typed, or transcribed, whether
12 verbatim or summarized, that they must be turned over, although
13 I find that defendant may redact from those reports any opinion
14 of counsel in the form of mental impressions or thoughts, legal
15 analysis, marginal notes, if such things are still done by
16 attorneys or investigators.

17 I'm going to require that these documents be turned
18 over to the plaintiff, and they can be turned over in their
19 redacted form. I will give the plaintiff an opportunity to
20 challenge those redactions if they believe there is a basis for
21 doing so. I am not encouraging the parties to do so, and once
22 again, I'm encouraging counsel to work collaboratively even in
23 less than ideal circumstances to move this litigation forward.

24 I will say that if the redactions are challenged and
25 I review in camera a sample of those unredacted interviews and

1 find that the redactions are not appropriate, I may find that
2 not only with regard to the samples but with regard to all
3 reports, that unredacted versions will have to be turned over.
4 So I am saying this up front to encourage the parties and the
5 defendant to be very careful in redacting what is appropriate
6 in this case.

7 I am not going to require -- I'm denying the motion
8 with regard to Northrop Grumman. I do find that the common
9 interest does apply. I am finding, consistent with *Royal*
10 *Ahold*, that these witness interviews that were conveyed in oral
11 form and relied upon through the documents and notes taken are
12 the subject matter that should be turned over.

13 Is there anything that I have failed to address with
14 regard to legal or factual issues that are before the Court
15 right now? I certainly understand -- we'll address the timing
16 of this in one moment. I certainly understand that there may
17 be differences of opinion over my ruling, but is what I have
18 said clear to the parties?

19 MS. DOUGLAS: If I may, Your Honor? What about any
20 sort of reports that stemmed from the investigations? I assume
21 those would fall under your order as well?

22 THE COURT: Come, come to the podium, please.
23 Investigative reports meaning the, some sort of analysis of the
24 entire investigation?

25 MS. DOUGLAS: An analysis of the underlying memos,